

1 UNITED STATES DISTRICT COURT

2 FOR THE WESTERN DISTRICT OF WISCONSIN

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4 OCEAN SPRAY CRANBERRIES, INC.,

5 Plaintiff,

6 -vs-

Case No. 10-MC-30-SLC

7 DECAS CRANBERRY PRODUCTS,
INC., et al.,
8 Defendants.

Madison, Wisconsin
January 5, 2011
1:02 p.m.

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10 STENOGRAPHIC TRANSCRIPT OF AUDIO RECORDING OF TELEPHONIC
HEARING HELD BEFORE MAGISTRATE STEPHEN L. CROCKER,

11

12 APPEARANCES:

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1 THE COURT: Good afternoon. This is Magistrate
2 Judge Crocker. I understand I have the attorneys for
3 the various parties and third-party witnesses in the
4 *Ocean Spray* case against *Decas Cranberries and others*.
5 I have the recorder on. We don't have a court reporter
6 available now. So let me just indicate for the record
7 that our case number is 10-MC-30. As you know, your
8 number in Massachusetts is 10-CV-11288.

9 And let's get some appearances, please. First, who
10 have we got on behalf of plaintiff Ocean Spray?

11 MR. DUCHEMIN: Good afternoon, Your Honor.
12 This is Matt Duchemin and Matt Splitek from Quarles and
13 Brady on behalf of plaintiffs. And I'd like to
14 introduce the Court to the lawyers for the Massachusetts
15 action from Latham and Watkins, who are also on the
16 phone, Al Pfeiffer and Jennifer Giordano. I understand
17 that Mr. Pfeiffer will be taking the lead arguing today.
18 They have been admitted to the Western District of
19 Wisconsin, I understand effective January 3rd, and
20 although they haven't made an appearance yet in this
21 case formally, they're prepared to do so if the Court
22 deems that necessary.

23 THE COURT: No, that's fine. We tend to take a
24 fairly informal approach to this. I granted that
25 pro hac vice motion yesterday. So good morning to all

1 of you.

2 All right. Then who have we got on behalf of the
3 named defendants today, if anyone?

4 MR. BOSSHARD: Your Honor, Andrew Bosshard from
5 Bosshard Parke in La Crosse. And I have co-counsel from
6 Ann Harbor, Michigan, Gregory Curtner and Kim Scott from
7 the Miller Canfield law firm.

8 THE COURT: All right. Well, good afternoon to
9 all of you.

10 MR. PFEIFFER: Your Honor, if I may. This is
11 Al Pfeiffer. Just to clarify. We contacted counsel for
12 the Decas defendants, the named defendant in the
13 Massachusetts action, and they elected not to appear
14 this afternoon.

15 THE COURT: Okay. Fair enough. And that's
16 actually where I was headed with this. So Mr. Bosshard,
17 you've got the deponents: Mr. Bentz, Mr. Gitter and
18 Mr. Teske?

19 MR. BOSSHARD: That's correct, Your Honor. I'm
20 also going to defer to out-of-state counsel in arguing
21 today, Mr. Curtner and Ms. Scott, if that's okay with
22 the Court.

23 THE COURT: That's absolutely fine. Let's just
24 set the stage a bit. We've got an hour if we need it,
25 but I'd like to keep it shorter, and frankly, I don't

1 think we need that much time.

2 I've got three motions to compel docketed as 1, 4
3 and 7 against Mr. Bentz, Mr. Teske, and Mr. Gitter
4 respectively. The response was a motion to quash
5 docketed by us as 11. Although Ocean Spray then said
6 well hey, let's get a seven-day response to that in and
7 then move the hearing back, the court said no, which
8 prompted plaintiff to get in its written response, I
9 believe, yesterday afternoon. And I did read that.
10 That's been docketed as 30. I've read all the
11 attachments.

12 So you've inserted this Court into the cranberry
13 wars, so I guess we just have to sort out what needs to
14 happen here today. And I'll hear from each side in
15 turn. We'll start with plaintiff as the original movant
16 and then get some input from the group that I'm calling
17 *the deponents*, through Mr. Curtner and Ms. Scott, I
18 suppose, and then if necessary, we'll ping-pong it a
19 bit. At least as local counsel know, I tend to be
20 fairly conversational and proactive during these
21 telephone calls to make sure that I understand what's
22 going on and get the facts that I need. So please
23 pardon any interruptions that I make, because there
24 definitely will be some.

25 But before I get input, why don't I give you the

1 Court's sense as to where I think we are headed today so
2 that nobody has to shoot in the dark. I have a general
3 sense as to where the lines are drawn here, and the
4 antagonism between the various parties is palpable.
5 Fair enough. That's really not this Court's concern.
6 It's up to Massachusetts to sort out the merits of the
7 underlying lawsuit under the AFPA and the allegations
8 there. To the extent that that might have some bearing
9 on this Court's Rule 45 analysis, certainly we can go
10 there if we need to.

11 But my initial concern is a little bit more
12 pragmatic. And I don't know what to draw from the fact
13 that the Decas defendants chose not to participate
14 today. But the most practical concern I've got today is
15 one raised by the deponents in that they don't want to
16 have to sit through more than one deposition in this
17 case. And that resonates with the Court. I understand
18 or at least I can infer with some accuracy that this
19 initial deposition is intended to sort out the sheep and
20 the goats here and maybe put some of the deponents into
21 the goat category as defendants. I think everyone is
22 sort of predicting that that's where this is all headed.
23 And I understand that the court in Massachusetts has
24 pretty much directed the plaintiff, Ocean Spray, to get
25 those John Does identified sooner rather than later,

1 which prompted this early discovery. I understand all
2 that and I don't have a problem with any of that.

3 However, if we've got new defendants who have been
4 named and apparently who have been served, and I'm
5 thinking specifically of Swendrowski and Bogs right now.
6 I don't know what their position is on these
7 depositions. And frankly, I don't know what Decas's
8 position is, and they're not on line to tell me today,
9 so I won't draw any conclusions, although I might infer
10 that they may not care a lot. Certainly that's fair
11 game for either side to discuss when I give you a chance
12 today. But it seems to me that the best way to assure
13 that we don't have to subject Misters Bentz, Gitter or
14 Teske to more than one deposition, in the event they are
15 not parties, is to allow Swendrowski and Bogs to appear
16 and respond in some fashion, whether it's a motion to
17 dismiss or something else, and find out whether they
18 want to be part of this at the front end.

19 I also have some secondary questions about the
20 efficacy of the depositions that have been proposed as
21 to why now. Why not wait until you get the discovery
22 responses from the named defendants? It's my
23 understanding that the responses were due December 22.
24 I don't know if that's actually occurred. That was
25 right before Christmas. So I'd like some information

1 about that. Have you got the information? Have they
2 named names? Have they pretty much said who's talking
3 about antitrust and so forth? And does that give you
4 the information you need as a plaintiff to start
5 identifying the John Does?

6 Then we have some other concerns about the scope of
7 the documents requested. At least from the Court's
8 perspective, it's asking for some stuff that probably
9 isn't fair game. But I'm not going to quash the
10 deposition for anybody just because they're claiming
11 some attorney/client privilege. As I think Ocean Spray
12 correctly noted, in the Seventh Circuit at least you
13 can't just stand up discovery or a deposition, you have
14 to make your attorney/client privilege or work product
15 privilege assertion question-by-question and
16 category-by-category and document-by-document. Even so,
17 I think that we do have some concerns about some of the
18 document requests here, but I don't think that's a
19 primary concern. It may not even be secondary. My main
20 concern right now is timing and undue burden. My
21 secondary concern is limiting the scope of this, and
22 then I guess that would be it for now.

23 So that's the Court's preliminary view. And I
24 guess sort of the upshot of all that is I'm not inclined
25 to quash the subpoenas completely. I think they're fair

1 on at least one or two levels. I just think that it
2 might be premature to proceed under Rule 45 if there's a
3 possibility that this may be just round one of several.

4 So with that, I'm done talking preliminarily.

5 Let's get some input on behalf of Ocean Spray as the
6 movant, please.

7 MR. PFEIFFER: Thank you, Your Honor. I'll try
8 to keep this as short as possible and try to focus on
9 the issues you've just raised. I think that really gets
10 to the heart of it, Your Honor. The reason we're here,
11 the reason we served these subpoenas is because we do
12 have this case in Massachusetts where we understand that
13 there have been a number of parties involved in these
14 violations of the Agricultural Fair Practices Act, but
15 we don't know who they are. We've only been able to
16 identify a very few of them, and that's not
17 surprisingly, I guess, because we're not a party to the
18 communications that they're having. I think by and
19 large, at least as far as we understand, the Ocean Spray
20 growers are not a main target of that and non-Ocean
21 Spray growers seem to be where the main part of the
22 action is going, which is why we have targeted these
23 individuals for the discovery. I think at this point we
24 really are just -- we are trying to get information. At
25 this point, we have no idea whether these three

1 individuals are people who are likely to be added as
2 defendants or not. I did want to correct that, Your
3 Honor. If there has been some suggestion that we
4 believe that's the case, we really don't know.

5 THE COURT: Mr. Pfeiffer, this is my first
6 interruption, I apologize, but there will be others.
7 I'm just curious, perhaps idly so. Are you doing this
8 with other third-party witnesses in other districts or
9 are these three it right now?

10 MR. PFEIFFER: We've started here. I think the
11 answer is, Your Honor, we don't expect that this will be
12 it because the cranberries are grown predominantly in a
13 few states, but Wisconsin is the biggest cranberry
14 producing state and it's where most of the growers are
15 involved. And we understand that there -- we understand
16 there have definitely been communications, meetings, et
17 cetera, in Wisconsin, and so we started there. We
18 suspect that there may also be some others; that we may
19 end up in other districts as well. But at this point,
20 we started in Wisconsin because we understand that
21 that's the definite focus point of this activity.

22 THE COURT: Okay. Back to you. I have some
23 other questions, but I'll wait because you may address
24 them with your responses.

25 MR. PFEIFFER: Certainly, Your Honor. That's

1 why we're here. It also -- it ties to what we found out
2 when we talked to these folks. Because there's no
3 dispute here that we properly served each of these three
4 individuals and they responded to us with letters back
5 saying no thanks, we're not going to appear. At that
6 point, we contacted them, and obviously the first thing
7 we did was ask whether they were represented by counsel,
8 and each of them told us they were not. And so we
9 talked to them. We explained we need to take these
10 depositions. The Court, in fact, has told us to take
11 discovery to identify those. And then each of them, in
12 the process of our communications with them, confirmed
13 that they have some relevant information; they knew
14 about communications, some in writing, some not in
15 writing, that relate to our existing Massachusetts AFPA
16 case. And in fact, they don't deny that in their motion
17 to quash either, that they actually do possess some
18 relevant information. We said well look, we'll work
19 with you on dates. We'll work with you on locations if
20 that's the problem, let us know, and we could work
21 around that and get this done smoothly. But otherwise
22 if you don't, we're going to need to move to compel
23 because we actually have to get this done, and this is a
24 good starting point for it. That's what really prompted
25 this motion, because they then again responded in

1 writing and just said no, and have taken a position, I
2 think amplified in their motion to quash, that we're
3 really not entitled to any discovery at all from anyone
4 based on a view of the merits of our case.

5 So with that, that's kind of gotten us to this
6 point right now where we need to move forward with
7 discovery. I'm sensitive to the Court's concern and to
8 these growers' concern about the possibility that the
9 addition of more defendants might subject them to
10 additional deposition obligations.

11 With the Swendrowski and Legacy Bogs defendants in
12 particular, I can tell you on behalf of Ocean Spray we
13 certainly have no objection to giving the Swendrowski
14 defendants notice of these depositions and an
15 opportunity to participate in them, even without waiving
16 any jurisdictional arguments that they might raise, if
17 they're planning to raise any. I don't know if they
18 are. I think that aspect of it is relatively easily
19 dealt with. The notion that there could be other
20 defendants who might say I want to go and take
21 Mr. Benson's deposition, for example, that's more
22 difficult to deal with, but I think is always the case
23 when there are Doe defendants and in this case where we
24 don't have access to the identity of the Does without
25 going and doing discovery, I don't think that there is a

1 perfect solution to that, one that can absolutely
2 insulate them.

3 THE COURT: Sure.

4 MR. PFEIFFER: Swendrowski and Legacy Bogs
5 defendants, I think we can make that easy by certainly
6 offering them the opportunity to participate in the
7 depositions.

8 THE COURT: Mr. Pfeiffer, let me interrupt.

9 It's not clear to me, and maybe I just missed it, but
10 were the Decas defendants interested at all in
11 participating in these depositions when you noticed
12 them?

13 MR. PFEIFFER: Yes, Your Honor. I believe they
14 were intending to attend the depositions.

15 THE COURT: Okay. Thank you.

16 MR. PFEIFFER: We -- I think both of us were.
17 Both they and we were about to get on airplanes to come
18 and take them when we got those letters saying they
19 weren't going to appear. So I believe they were going
20 to participate; they just chose not to participate in
21 this hearing. We invited them and they said --

22 THE COURT: Understood. Let me interrupt with
23 another question, and then hold your thought and
24 continue with your presentation. But I understand from
25 the very fact that you filed these motions and all of

1 your documents in support that you're being pushed by
2 the court in Massachusetts to get your Does identified.
3 But it's not at all clear to the Court what kind of time
4 line you can expect in a civil lawsuit in Massachusetts.

5 I think we're fairly predictable. I know
6 Mr. Duchemin could tell you that. But we set quick firm
7 trial dates, usually a year or less from the pretrial
8 conference. What's going to be happening here? In
9 other words, if it takes you two, three, even four
10 months to identify all of your Does, what impact will
11 that have on how quickly you will move forward, if any?

12 MR. PFEIFFER: Well, I think that's exactly the
13 problem, Your Honor. Where things stand with the
14 Massachusetts court is the court didn't want to set a
15 full schedule for the case. It hasn't set a trial date
16 at this point, precisely because she wants to get a
17 better sense of exactly who all is going to be in the
18 case. And so it does -- the more this process drags
19 out, unfortunately the more it does drag out the overall
20 staging of the Massachusetts case, which is one of the
21 reasons we're trying to jump on this as expeditiously as
22 we can.

23 THE COURT: Okay.

24 MR. PFEIFFER: Another point on the Decas
25 defendants, Your Honor, not only obviously did they not

1 appear at this telephone hearing, but even though they
2 were going to participate in the depositions and are
3 interested in that process, they never moved to quash
4 these subpoenas.

5 THE COURT: Well, they don't have standing, so
6 that's not unusual.

7 MR. PFEIFFER: Okay. I'll go no further with
8 that one. I think I may have interrupted you as you
9 were about to ask another question.

10 THE COURT: Right. Well no, I do that a lot,
11 but that's just the way I hold these conferences. The
12 next question I wanted to ask you was understanding that
13 you're sort of in limbo in Massachusetts because the
14 judge is waiting for the Does to get identified, we've
15 got this assertion on behalf of our three deponents here
16 that your lawsuit is worthless. It's a strike suit.
17 Understanding that your position on that is diametric,
18 what response has Decas filed? Are there motions to
19 dismiss filed instead of answers or is there a motions
20 deadline for preliminary 12(b)(6) motions from the
21 court? How is that going to be addressed promptly, if
22 you know.

23 MR. PFEIFFER: Well, the Decas defendants, the
24 existing served defendants actually, Your Honor, chose
25 not to file motions to dismiss. They have answered.

1 THE COURT: Okay. Thank you. I'm done with
2 questions for now, so why don't you continue.

3 MR. PFEIFFER: Okay. But that point I think
4 that does speak to the merits issue; that the defendants
5 that are actually in the case, the real world ones,
6 looked at this, has determined, obviously we'd be
7 reading their minds, but they decided to answer, not
8 move to dismiss. And I don't think they, you know,
9 intended to confess liability by doing so, but we've got
10 right now, we've got a case that is on the merits not
11 challenged and there was an opportunity obviously -- and
12 we all know litigators. We challenge things if we think
13 there's a good solid basis to do that. They didn't do
14 that. They went ahead and answered and the case has
15 gone forward and the court has looked at it and the
16 court, in the parties' preliminary status conference --
17 I would call it a scheduling conference, but she didn't
18 actually set a schedule -- she talked to the parties
19 about the merits and I think she's intrigued by the
20 case, certainly did not suggest to anybody we should be
21 briefing a motion to dismiss that wasn't made.

22 So Your Honor, I think where that brings us back to
23 is this is a case where the subpoenas were validly
24 issued, properly served, they're addressing discovery,
25 knowledge information that these parties have that is

1 within the scope of our validly pleaded allegations in
2 that case. Nobody is suggesting again that what we're
3 asking for is not relevant to the case. What they're
4 saying is there's no case and that, I think -- the
5 question of the merits really does belong in front of
6 the Massachusetts court.

7 To the extent that in the Rule 45 setting courts
8 look at the merits, typically that's in the setting of
9 is this discovery related to the merits. But that's not
10 an argument that's being made to you here. So I think
11 this really is a pretty clear-cut situation where, you
12 know, if there's some suggestion that particular items
13 we've asked for are too broad or something, that's
14 actually never been asserted. There's never been any
15 particularized objection here as to Request Number 3 is
16 too broad or something like that.

17 To the extent that the scope objection is addressed
18 to the attorney/client privilege, that really is dealt
19 with by making a privilege objection and withholding
20 discovery, not by saying well, therefore this motion --
21 this Rule 45 subpoena can't go forward. I think that's
22 the easy solution to that situation as well. If they
23 want to assert the attorney/client privilege, the
24 growers have the ability to do that, but that's not
25 grounds to quash a validly issued subpoena. So I think

1 where we are is these subpoenas should be enforced.

2 THE COURT: Okay. Two more unrelated questions
3 to you, Mr. Pfeiffer, then I'll hear, I believe, from
4 Mr. Curtner on behalf of the deponents. The first
5 question is when you filed your Complaint and named the
6 Does, you've already told me that you don't really have
7 access to who these people are, which is why you
8 identified them as Does, but you can pretty much surmise
9 that Wisconsin and Oregon are where they may be. Well,
10 we all know what Rule 11 requires, so I don't mean to
11 imply that you don't know what you're talking about.
12 But for the purposes of talking to these three
13 deponents: Mr. Bentz, Mr. Gitter and Mr. Teske, what
14 basis do you have to seek them out as your information
15 sources as the point people, as the first ones to go
16 after?

17 MR. PFEIFFER: We identified these three as
18 people -- well, I guess I'll take them one-by-one.
19 Mr. Gitter is actually involved in a separate
20 cooperative, as we understand; that he has been involved
21 in some communications. And part of this is sort of the
22 telephone game. We hear things from someone, who heard
23 things from someone else, and that's kind of the
24 problem. But it's the nature, I think, of the
25 agriculture community is there's a lot of word of mouth.

1 And I guess that's really the short answer is we've
2 identified these three individuals through word of mouth
3 as people who would have knowledge of these
4 communications. No one said that they're the ring
5 leaders of them or that they're likely defendants, but
6 that they had knowledge of written and oral
7 communications relating to these AFPA claims. We know
8 that there have been meetings in person. We understand
9 that there have been meetings at which a large number of
10 growers have been present, for example. We just don't
11 know who they are. But through the word of mouth in the
12 agriculture community, people who weren't there are
13 hearing about these things and they identify these three
14 as likely candidates who would have been at least at
15 some of the meetings and would know about written and
16 oral communications that were circulated.

17 THE COURT: Thank you. So here is my last
18 question before I get some input on behalf of the
19 deponents, but in a way it segues tangentially from my
20 Rule 11 citation in my previous question. But you've
21 got a very broad list of document requests attached to
22 the subpoenas, and I've got a hard copy in front of me.
23 I printed that out. And I circled some about which I
24 had questions, and these are not rhetorical questions, I
25 don't ask rhetorical questions, but I'm looking

1 specifically at 5, 13 and 14. And just to refresh your
2 recollection, I'm sure you don't have that in front of
3 you, but 5 is documents relating to meetings you
4 attended in which people discussed possible lawsuit. 13
5 is more general: Documents, commercial advertising,
6 public statements, et cetera relating to Ocean Spray.
7 Not claiming falsehood, but just anything related to
8 Ocean Spray. And 14 is all documents received from
9 anyone contemplating a lawsuit. Well, as you know,
10 under 2303, what you have to prove is that somebody
11 knowingly made false reports, among other things. Why
12 is it discoverable to learn that people are thinking
13 about a lawsuit when people thinking about a lawsuit
14 have their own Rule 11 obligations not to make false
15 statements to the court? In other words, why should
16 these three topics be allowable at this point as
17 discoverable information given the nature of scienter
18 required in your lawsuit?

19 MR. PFEIFFER: Certainly, Your Honor. We have
20 received some written communications that have been
21 exchanged among growers and accusations have been made
22 in those written communications that accuse Ocean Spray
23 of having committed knowing violations of the antitrust
24 laws, including having manipulated auction processes,
25 which essentially amounts to an accusation of us having

1 engaged in criminal price-fixing behavior, and also
2 allegations that we are responsible for basically the
3 ruination of the cranberry industry through our
4 practices. We know that those kind of written documents
5 are out there, and in those written documents those are
6 stating that that is -- that that is the supposed basis
7 for this threatened lawsuit. So the fact that a lawsuit
8 is based upon activity or based on accusations, let's
9 immunize those accusations, and that's why we focused on
10 these suits, because we think that that will be again,
11 under the standard of reasonably likely to lead to the
12 discovery of admissible evidence, we think those
13 meetings where they were discussing lawsuits, would be
14 the same meetings where they would be discussing those
15 kind of factual allegations, which are simply false.

16 THE COURT: Well, that leads to one question
17 which I suppose you and I might deem impertinent, but
18 I'm going to ask it anyway. Page two of the brief in
19 support of the motion to quash starts the background
20 section by asserting Ocean Spray is a monopolist in all
21 aspects of the growing, processing, manufacturing of
22 cranberries and cranberry-related products. Is that a
23 2303 violation right there?

24 MR. PFEIFFER: I don't think that doing it in
25 an actual pleading is a violation, but I honestly don't

1 know the answer to that, Your Honor. I would suspect
2 not, but I don't know the answer.

3 THE COURT: Okay.

4 MR. PFEIFFER: To the extent that it
5 constituted a sham allegation, then I think it probably
6 would be. My understanding -- I would draw more on the
7 analogy of *Noerr-Pennington* liability or immunity under
8 the antitrust laws and the typical rule obviously being
9 that if you state something in a court filing, that's
10 not actionable, but it can be in a setting where the
11 litigation is itself completely without merit and
12 therefore a sham.

13 THE COURT: Understood. Well, I think this
14 sort of veers into the merits, which is not at all the
15 issue before this Court and I don't intend to go there,
16 but clearly the deponents and their lawyers and perhaps
17 a lot of their colleagues and friends truly believe that
18 Ocean Spray is a monopolist or they wouldn't have
19 asserted it so vigorously. So then you have to wonder
20 if they really believe this, did they knowingly make
21 false reports. But that is a rhetorical question. I
22 don't expect an answer.

23 But Mr. Curtner, I think that's your cue. Why
24 don't you give me your input, if you're the spokesperson
25 today, about where we landed and what ought to happen

1 next.

2 MR. CURTNER: Thank you, Your Honor. First of
3 all a point of clarification. Mr. Swendrowski and
4 Legacy Bogs have not been served or at least as of two
5 days ago had not been served and the court in
6 Massachusetts allowed the First Amended Complaint on
7 December 9th. The First Amended Complaint was actually
8 filed on December 14, but there's been no effort to
9 serve Swendrowski or Legacy, even though they live and
10 have a place of business, they're easy to find in
11 Wisconsin, and so what's going on here is a bit of cat
12 and mouse game. They're trying to put pressure on these
13 three individual nonparties to be deposed and produce
14 information. Hopefully -- apparently they hope they
15 would do so without the help of counsel. Before
16 Mr. Swendrowski has a chance to respond and possibly
17 file a motion to dismiss, it's my understanding that he
18 intends to do so, if and when he is ever served.

19 The Decas defendants had a different issue before
20 them. The allegations against Decas include not just
21 the claim that he participated in discussions about a
22 potential antitrust suit and that he may have urged
23 people to join in such an antitrust suit on behalf of
24 cranberry growers and handlers, but there's also an
25 allegation that he helped to sponsor a website about an

1 Ocean Spray product which he called *scam berries* or that
2 somebody called scam berries, and so there's a claim of
3 some kind of claim liable or false statements relating
4 to these things that were called *scam berries* and to a
5 website that supposedly was sponsored or not sponsored.
6 I think that's why they may have decided to answer
7 rather than move to dismiss.

8 But the only allegation against Mr. Swendrowski and
9 Legacy Bogs is that they somehow violated the AFPA by
10 sending a letter, and everybody has a copy of the
11 letter, there's no secret about that, in which
12 Swendrowski stated his views relating to the merits of
13 this lawsuit. And you are correct that Ocean Spray is
14 widely viewed as a monopolist, including by the
15 Department of Justice back in the Eisenhower
16 Administration, and they are still subject to a consent
17 decree regulating their behavior under the antitrust
18 laws. And I can send you tomorrow or this afternoon a
19 copy of a document issued by Ocean Spray and a press
20 release quoting Ocean Spray in which they bragged about
21 having 62% of the world's cranberry market under their
22 control.

23 THE COURT: Well Mr. Curtner, let me interrupt
24 you there because I didn't mean to encourage merits
25 argument today because it really isn't any of my concern

1 and frankly I don't have jurisdiction over it in any
2 event. But what I'd like to focus on is understanding
3 all of your arguments, and I think you made seven
4 different points in your motion to quash, and
5 understanding that at least among other things your
6 clients, the deponents, are asserting First Amendment
7 rights to free speech and assembly and so forth,
8 obviously that's their view. And obviously from your
9 brief there is this view that apparently is truly held
10 that Ocean Spray is an monopolist and that nothing
11 they've said is false.

12 But notwithstanding that, for Rule 45 purposes, why
13 should Mr. Bentz, Mr. Gitter, and Mr. Teske not be
14 required to sit down and talk about these things if they
15 may be John Does or if they may have information
16 relevant to the John Does who are actually named in the
17 Complaint that's been filed?

18 MR. CURTNER: I think two reasons, Your Honor.
19 And I was trying to get there. I might have gotten a
20 little carried away on the merits of the antitrust
21 issues, but I could have gone on a long time. The two
22 basic reasons are that on the scope, on the face of
23 these subpoenas, the information sought is all
24 protected. It's either First Amendment protected speech
25 or assembly or seeking advice of counsel; or it's

1 material prepared by counsel or given to counsel for the
2 purposes of seeking legal advice; or it's joint interest
3 privilege by people with common interest seeking to
4 consider if, when, and how to pursue their legal rights.

5 THE COURT: Well Mr. Curtner, I'm sorry, I'm
6 going to interrupt you just like I did with
7 Mr. Pfeiffer. But I understand the attorney/client
8 privilege, and to the extent that these depositions ever
9 are held and I'm predicting they will be eventually,
10 certainly each one of your clients is entitled to make a
11 good faith assertion of attorney/client privilege or
12 work product privilege or whatever. I mean that's all
13 clear from the rules and certainly nothing this Court
14 would ever require of them would change that.

15 But when you talk about First Amendment privilege,
16 I don't know what that means. I mean let's start with
17 the baseline that the First Amendment means that all
18 speech is protected. That doesn't mean you can't be
19 deposed about something you said. You did invoke this
20 Court's ruling in the Amazon subpoena case, but that was
21 a little different. That was a grand jury subpoenaing
22 third-party information in a criminal investigation, to
23 which they had absolutely no connection, and it was
24 looking into reading habits of private citizens. Here
25 my understanding is that they're looking for -- the

1 plaintiff is looking for information about what was said
2 publicly that the plaintiff alleges was knowingly false
3 and which of course the speakers would disagree. But
4 that's really not the point for today.

5 What First Amendment privilege exists here that
6 would prevent the deposition from occurring?

7 MR. CURTNER: Your Honor, the statements and
8 the requests seek information that was not made
9 publicly. It seeks information about meetings that were
10 attended by growers and lawyers to discuss possible
11 lawsuits.

12 THE COURT: Okay. But that's attorney/client
13 privilege, isn't it?

14 MR. CURTNER: Yes, and it's also common
15 interest privilege. But it's also -- it's clear that
16 the First Amendment -- and we cite the cases on that
17 point -- protects that just as the attorney/client
18 privilege does. And so the freedom to associate, to
19 consider protecting your legal interests, is protected
20 by the First Amendment. And on the face of these
21 subpoenas, that's all that's being sought.

22 Now I agree that ordinarily if relevant information
23 is being sought, that the way that you go is
24 question-by-question, document-by-document when there
25 are privilege issues involved. But I think that this

1 case is actually fairly close to the Amazon grand jury
2 case where innocent third parties are being asked to
3 disclose information which is protected by the First
4 Amendment, just as the reading habits of the customers
5 of Amazon were protected by Your Honor under First
6 Amendment concerns.

7 THE COURT: And I'm sorry for interrupting --
8 I'm sorry, but let me just ask for a little bit more
9 factual clarification because I'm sorry that this is
10 shooting past me, but I'm not grabbing it. I understand
11 that if there were group meetings with attorneys present
12 and the discussion was, you know, should we sue Ocean
13 Spray or not and there was a lot of discussion there and
14 a lot of things said, that that's arguably and perhaps
15 actually privileged. I don't have a concern about that.
16 But where I'm missing your argument is other than that,
17 the fact that these meetings were not open to the public
18 and perhaps held in somebody's basement den without an
19 attorney present or where they weren't seeking legal
20 advice but were simply railing against that horrible
21 monopolist Ocean Spray, certainly they're entitled to
22 their opinion, and certainly if it's true it's a
23 defense, but I don't understand why that's not
24 discoverable by Ocean Spray to attempt to figure out who
25 was saying these things that it alleges are knowingly

1 false.

2 MR. CURTNER: There may be a hypothetical
3 possibility of some unprotected conversations. I
4 understand the Court's concern and the Court's question.
5 But on the face of these subpoenas and on the face of
6 these motions, all that's being sought is either
7 protected information or the identity of possible
8 additional Doe defendants, which is outside the scope of
9 the current pleadings. And the --

10 THE COURT: Well, wait, wait, wait. Let's back
11 up. If the Does are named, they're in it. It's just --
12 it's just that nobody knows what their actual identity
13 is. So they're in the lawsuit. It's just that neither
14 the plaintiff nor the Court nor perhaps even the Does
15 themselves know who they are. So aren't they in the
16 lawsuit?

17 MR. CURTNER: Except there's no allegation that
18 any of these Does did anything. The only allegation is
19 that Decas did some things and that Swendrowski sent a
20 letter. That's all we've got.

21 THE COURT: Okay.

22 MR. CURTNER: Those are the only factual
23 allegations in the Massachusetts case. And what they
24 want to do is go out and find some other people who may
25 have been considering a lawsuit and may have, during the

1 course of that consideration, said something that
2 somebody might want to claim is false. Expressing an
3 opinion about the merits of a monopoly claim is
4 certainly not something capable of being true or false.
5 But on -- so they properly responded by saying you are
6 seeking protected information. I want -- I assert my
7 First Amendment rights, my attorney/client privilege
8 rights, my work product rights, and my preassociation
9 rights and my common interest rights. The burden at
10 that point shifted to counsel for Ocean Spray under Rule
11 45(c)(1) to avoid undue burden or expense to protect a
12 person subject to a subpoena, and they didn't do that.
13 What they did is they called these individuals and said
14 show up or we're going to move to compel and for
15 contempt. The three individuals then responded by
16 sending a second letter saying you are seeking
17 information that is protected under a variety of
18 doctrines. We think that's inappropriate. Ocean Spray
19 did nothing to comply with their 45(c)(1) burden and
20 they should be quashed on that ground alone. We have no
21 basis on this record to think that the hypothetical
22 which you raise, which I agree is a legitimate concern,
23 has any basis in fact here; that these folks did
24 anything that is discoverable or that has anything to do
25 with any false statements that may or may not be

1 actionable. And the burden is on the party seeking to
2 compel to protect these people from burden.

3 That goes back to the question if the issue is who
4 made a false statement to whom, Decas knows the answer
5 to that. Swendrowski knows the answer to that. To the
6 extent it's unprivileged, presumably it's discoverable
7 from them. If the question is were some Ocean Spray
8 cooperative members somehow induced or coerced or
9 importuned to leave the co-op, the Ocean Spray members
10 who are part of Ocean Spray know the answer to that.
11 They can collect that information.

12 The judge in Boston expressed a grave doubt about
13 the merits of this case and told Ocean Spray to report
14 back by January 27th, at the next status conference, to
15 identify for her any members who have left the co-op
16 allegedly as a result of these false statements or any
17 persons who have declined to join the co-op as a result
18 of these alleged false statements. At the last
19 conference, Ocean Spray was unable to identify any such
20 person, and in fact, we believe there is no such person
21 because the membership of the co-op has grown
22 substantially over the last year.

23 THE COURT: Well Mr. Curtner, let me ask you
24 this because now we're veering back into merits and that
25 really isn't this Court's concern. But it does raise a

1 question that I'd like to pose to you, and then I'll get
2 Mr. Pfeiffer's response as well. But backing up to a
3 more general practice of most judges confronted with
4 Rule 45 subpoenas, certainly we all do what we think is
5 best when confronted with a motion to quash or to compel
6 in response to these types of cases. But let's face it,
7 as I've said several times and as you all have
8 acknowledged, this case belongs to your judge in
9 Massachusetts. Oftentimes the fairest and most
10 efficient way to resolve a lingering dispute is to get
11 input from the presiding judge, which of course is not
12 binding on the Rule 45 judge, otherwise we wouldn't even
13 be holding this hearing, but certainly can be of great
14 merit.

15 Now let me pose this question to you to get your
16 response to it: In the event the Court were not to
17 quash the subpoenas today, and frankly I'm not going to,
18 I can't anticipate actually throwing them out today, but
19 were to stay their effect until a couple of things
20 happen: One, that we get some sort of an appearance
21 response by Swendrowski and Legacy Bogs, and two, if the
22 parties think it would be efficacious to get input from
23 your presiding judge in Massachusetts as to whether this
24 is what she had in mind for identifying the people.
25 Frankly I think I would predict the answer to be it's

1 fair for Ocean Spray. But in the event that the judge
2 is being proactive and is trying to move this along,
3 could it hurt anything to get her input, saying that she
4 has no problem with this and if it were her call to
5 make, she would allow some or all of the depositions to
6 go forward? Or vice versa, that she thinks it's a waste
7 of time, the case is no good, and nobody should be
8 bothered with it.

9 MR. CURTNER: Well, Your Honor, I certainly
10 think that Mr. Swendrowski and Legacy Bogs need to get
11 served and appear in the Boston action and do whatever
12 they're going to do in response. And they may decide to
13 seek some relief about discovery from that judge. It
14 may be that that judge will be asked directly by one or
15 more of the parties to get involved on some of these
16 issues because some of the discovery sought there will
17 go to the same privilege and work product issues and
18 First Amendment issues that we're raising here. So I
19 think you are correct to say that that judge probably
20 ought to have first say on these things.

21 As to your specific request of whether it would be
22 okay to talk to that judge, I have no problem with that,
23 although I do think it would be better to wait until
24 after Swendrowski has done whatever he's going to do so
25 that all the -- at least the existing parties are before

1 that court. Because it's my understanding that --

2 THE COURT: Right, let me interrupt again. I
3 apologize. But certainly that was what I anticipated.
4 I don't mean to make this a hopscotching procedure or
5 leap-frogging procedure. I was anticipating getting
6 Swendrowski and Legacy Bogs on board, getting them in
7 front of the Massachusetts judge, putting them -- figure
8 out what their position is on these Rule 45 subpoenas,
9 and then perhaps putting it before that judge. Because
10 frankly, just like Decas didn't have standing to
11 challenge your client's subpoenas, I'm not sure that you
12 have standing to appear in front of the Massachusetts
13 court on behalf of your clients here in Wisconsin to ask
14 for relief or even an advisory opinion. I think one of
15 the parties would have to do that. So that would be
16 what this Court anticipates.

17 MR. CURTNER: I agree that I don't have
18 standing in Massachusetts. We thought about that, Your
19 Honor, and I suspect that that's why Ocean Spray is not
20 serving Swendrowski is it keeps him from showing up to
21 make the arguments you're suggesting should be made.

22 THE COURT: Well, I'm not suggesting what
23 should or should not be done, I'm just looking for the
24 parties' opinion about what would be most efficacious
25 here, and as I indicated, oftentimes getting input from

1 the presiding judge as to what that judge thinks is
2 appropriate is helpful to the Rule 45 judge. But with
3 that, Mr. Curtner, why don't you give me a couple of
4 sentences on wrap up, I'll hear a reply from
5 Mr. Pfeiffer, and then I'll tell you what we're going to
6 do today.

7 MR. CURTNER: I think I'm basically through,
8 Your Honor. I really think the most pertinent point is
9 the one I made, that a lot of this could have been
10 avoided by counsel complying with Rule 45(c)(1) and
11 narrowing the scope of things. But they declined to do
12 that.

13 Secondly, that that same obligation on the parties
14 seeking discovery clearly mitigates in favor of not
15 trying to burden these third parties unless and until
16 Swendrowski got a chance to be heard and do whatever
17 he's going to do in Massachusetts. And the report goes
18 back to the Massachusetts judge on January 27th as to
19 how Ocean Spray believes it has somehow been harmed by
20 any of this talk about a lawsuit.

21 THE COURT: All right. Well thanks for your
22 input. Mr. Pfeiffer, why don't you give me a brief
23 reply and then we'll give you a ruling for today.

24 MR. PFEIFFER: Certainly, Your Honor. Let me
25 start with this issue about Mr. Swendrowski and service

1 of him, because there's been a suggestion that we, Ocean
2 Spray, are trying to game this somehow to exclude him
3 from the process. Let me assure you quite the opposite.
4 Mr. Swendrowski is represented by counsel; not counsel
5 who is on the phone here today, none of us represent
6 him. He's represented by his own counsel. And that
7 counsel asked us not to serve him and said that he wants
8 to meet with us and prefers that we meet with him rather
9 than serve him. We've been trying to schedule that with
10 everybody's busy schedules, that's why we haven't served
11 him, at his request.

12 THE COURT: And I accept that, Mr. Pfeiffer.
13 I'm not going to pick sides on that one. Really my job
14 is more pragmatic, because once we resolve this, I'm out
15 of your lawsuit for the most part. I guess the question
16 is still, and I'll let you respond in whatever other
17 fashion you think is appropriate, but do you have any
18 additional concerns or observations you'd like to offer
19 in response to the Court's plan simply to stay this
20 until you get Swendrowski on board and perhaps get a
21 chance to get some input from the Massachusetts judge?

22 MR. PFEIFFER: I think input from the
23 Massachusetts judge is a good idea, Your Honor, and I
24 think that that would put to rest the notion that she
25 has what was called grave doubts about our case. That's

1 not at all what she indicated at the scheduling
2 conference. We were there, Your Honor.

3 THE COURT: Sure. And she's the one who told
4 you to go out and find your John Does, so I think I can
5 predict what she might say, but I presume you don't have
6 any problem with asking her if she's got any input on
7 the efficacy of your Rule 45 subpoenas from Wisconsin.

8 MR. PFEIFFER: No, we don't, Your Honor. The
9 only concern I would have is I would hesitate to
10 condition that on Mr. Swendrowski's doing anything in
11 light of the fact that he has sought us out and
12 apparently wants to talk about some resolution that
13 involves him not being ultimately served and a party in
14 a lawsuit.

15 THE COURT: Well, I'm not going to tell you how
16 to litigate your case, but as long as -- from this
17 Court's perspective, so long as Mr. Swendrowski's lawyer
18 is advised of this Court's plan and is given the
19 opportunity to opt-in and be heard on this and perhaps
20 participate in the deposition or not, it is up to him
21 then whether he chooses to go forward or not and based
22 on what he does, does not do or fails to respond, I'll
23 leave it to you to decide what your calendar is.

24 MR. PFEIFFER: That's great, Your Honor, with
25 that clarification, which I very much appreciate. From

1 our perspective, getting -- if getting guidance from the
2 Massachusetts court will help this Court with its Rule
3 45 decision, we'd like to do that as expeditiously as
4 possible.

5 THE COURT: Well, I'll leave it to you to do
6 that in the manner that is most efficient and most
7 desirable to that court. And let me make it clear to
8 both sides I'm capable of giving you a ruling and at
9 least at this point my position is that I would not
10 quash the subpoena. I might require the parties to meet
11 and confer and see if they can narrow it, but I also
12 don't want you wasting your time arguing with each other
13 point-by-point. I think I can predict that this is
14 going to be a fairly contentious, hard fought deposition
15 for each of these three men and there may be myriad
16 assertions of privilege, and if Mr. Curtner is right, it
17 will be 100%, in which case we may all be on the phone
18 again. But I don't go looking for trouble, I wait for
19 trouble to come and find me.

20 And so with that, I think if we stay proceedings
21 indefinitely waiting for, I suppose, the movant, for
22 Ocean Spray to get back to the Court and ask for further
23 action, we're done for today.

24 Mr. Pfeiffer, it was your motion originally. Can
25 you live with that?

1 MR. PFEIFFER: Yes, Your Honor, only -- the
2 only thing I question is if, for example,
3 Mr. Swendrowski is not the trigger for the reasons that
4 we've suggested, if the Massachusetts court says I don't
5 understand this procedurally, this doesn't seem like
6 there's a dispute, I guess we'd need to come back to you
7 and perhaps ask for some assistance in getting the court
8 to give us that.

9 THE COURT: I'm sorry, I'm not tracking.

10 MR. PFEIFFER: In other words, if the court
11 came to us and said wait, you're coming to ask me about
12 a Rule 45 dispute that I don't have a role in, how can I
13 give you any information that --

14 THE COURT: Oh, sure. I could give you a
15 ruling today. But the main reason I'm staying is I want
16 to give Swendrowski, Mr. Swendrowski, a chance to be
17 heard. We already talked about that. I'm not going to
18 repeat myself. He can choose to be heard or not on
19 that.

20 As long as we're waiting for that, my secondary
21 suggestion is that you seek input from the judge in
22 Massachusetts as to whether this is what she had in mind
23 in terms of getting John Does. If she gives you this
24 question like what are you asking me, that's fine. If
25 she doesn't have anything to offer, I'm not going to ask

1 you.

2 MR. PFEIFFER: I'm not going to blame it on
3 you, Your Honor. For sure.

4 THE COURT: I can give you a ruling today if
5 necessary, but I always like to give the presiding judge
6 the opportunity to be heard, if it would be helpful to
7 the parties in framing the dispute or the resolution by
8 the Rule 45 judge.

9 MR. PFEIFFER: Understood, Your Honor. We will
10 bring it to the Massachusetts court's attention and see
11 what we can accomplish.

12 THE COURT: All right. Well then the ruling
13 today is that I will stay this pending further input
14 from any party notwithstanding. Mr. Curtner, anything else
15 today then?

16 MR. CURTNER: No, Your Honor, other than if the
17 issue relating to these subpoenas is going to be
18 discussed with the judge in Boston, we would request to
19 be invited. Obviously whether we are allowed to be
20 heard or not would be up to that judge, but we would
21 request to have notice of any such conversation.

22 THE COURT: I think you're entitled to the
23 notice. I don't know that you're entitled to be heard,
24 but I'll leave that to the district judge in
25 Massachusetts to sort out.

1 MR. PFEIFFER: We will certainly make sure you
2 have notice.

3 THE COURT: Okay. Well, I think that's all we
4 can accomplish today. This has been helpful and I'm
5 sure we'll be back on the phone soon to give you a final
6 ruling, but let's wait for some other actions to occur
7 before then. With that, thank you all, and please enjoy
8 the rest of your day.

9 VOICE: I'm sorry, Judge Crocker --

10 (End of hearing at 1:56 p.m.)

11

12 I, LYNETTE SWENSON, Certified Realtime and Merit
13 Reporter in and for the State of Wisconsin, certify that
14 the foregoing is a true and accurate transcription of
15 the audio recording held on the 5th day of January 2011
16 before Stephen L. Crocker, Magistrate Judge for the
17 Western District of Wisconsin.

18 Dated this 9th day of January 2011.

19

20 /s/
21 Lynette Swenson, CRR, RMR, CBC
22 Federal Court Reporter

23
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